MOTION FILED
AUG 7 1997

(4)

No. 97-49

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

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August 7, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

27 pp

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Edison Electric Institute ("EEI") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The written consent of the petitioner, Portland General Electric Company ("PGE"), has been obtained. In addition, the consent of the Public Utility Commission of the State of Oregon, a party to the proceedings below, has been obtained. The consent of the respondent, Columbia Steel Casting Co., Inc., was requested, but refused.

EEI is the association of the nation's investor-owned electric utility companies and their affiliates worldwide. EEI previously participated in the instant case *amicus curiae,* supporting PGE's Petition to the Ninth Circuit Court of Appeals for Rehearing *En Banc.*

EEI is concerned that the circuit court's decision will have significant impact on electric utilities that are subject to state regulation of service, price, territories and other aspects of their businesses. As pervasively regulated entities, EEI's members are vitally interested in the standards for application of the state action immunity doctrine to state regulatory processes and the activities of regulated firms taken pursuant to those processes.

EEI's members have developed and operate vast networks of electric distribution facilities. These include wires, substations and related facilities which are used to deliver electricity to retail customers. In many instances, the construction and operation of electric distribution facilities is limited by various forms of state regulation establishing exclusive service territories at retail as a means of eliminating uneconomic duplication of wires and related facilities. In many cases, these territorial allocation regulatory programs have been in place for decades. EEI member utilities are involved in extensive arrangements that were established in reliance on the integrity of existing state regulation. In view of EEI members' significant investment in these facilities on behalf of their customers, EEI has a keen interest in the application of federal antitrust principles that are consistent with regulatory programs of this type.

In addition, all fifty states and the District of Columbia currently are considering reforms to the regulation of retail electricity sales and distribution. To date, fifteen states have approved the introduction of retail competition for the sale of electricity. Many of these reforms, while evidencing a state policy favoring competition for certain aspects of the market, are likely to retain significant state regulation of the retail distribution function. These reforms will vest substantial authority in state public utility commissions to impose appropriate limitations on the nature and extent of the competitive activities and to supervise the activities of market participants complying

with those restrictions. Indeed, the Antitrust Division of the Department of Justice ("DOJ") has recognized that the transmission and distribution segments of the industry will remain regulated for the foreseeable future and "[t]he challenge . . . [will be] to foster vigorously competitive generation markets within the context of regulated transmission and distribution monopolies." [1] In this era of industry restructuring, as the mixture of competition and regulation evolves, it will be critical for electric utilities to know with certainty when their actions are subject to antitrust scrutiny and when they are not—especially where applicable regulatory orders have been crafted with less than complete precision.

EEI believes that the brief it seeks permission to file will present the Court with useful discussion of issues that are not likely to be contained in the briefs of the parties. These issues include: a discussion of the likely effect of the circuit court's decision on other state utility territorial statutes; a discussion of the federalism implications of the lower courts' state action immunity standard; and a discussion of the adverse effect that the circuit court's misapplication of the state action immunity doctrine, would have on regulated electric utilities in the current and evolving market environment.

Dated this the 7th day of August, 1997.

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[1] A. Douglas Melamed, Deputy Assistant Attorney General, Department of Justice, Antitrust Division, *Prepared Statement before the Committee on the Judiciary of the United States House of Representatives—Hearing on Antitrust Aspects of Electric Utility Deregulation* (June 4, 1997) <http://www.usdoj.gov/atr/speeches/1130.htm> (hereinafter, "Melamed Statement").

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

The Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies. Its members generate approximately 78 percent of all electricity in the country and serve 76 percent of the nation's electricity users.

The members of EEI are subject to extensive service and price regulation at the state level. As electric utilities subject to state regulatory supervision, the members of

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

EEI are concerned that the decision of the circuit court will have impact far beyond its direct effect on one electric utility in Oregon. The circuit court's decision significantly and improperly restricts the protection afforded to regulated private parties by the state action doctrine and, in so doing, may expose investor-owned utilities to antitrust risk for actions taken in compliance with state regulatory policy. Moreover, the circuit court's holding may unduly burden and interfere with the proper operation of the state mechanisms that regulate virtually every aspect of the electric utility industry.

This is a critical period of transition for electric utilities. All fifty states and the District of Columbia are considering reforms to the regulation of the distribution and retail sale of electricity. To date, fifteen states have approved the introduction of competition in the retail sale of electricity and certain related activities. All of these states continue to regulate the distribution (or delivery) of electricity and related activities and continue to rely upon regulatory commissions to implement the restructuring process. Some states are experimenting with pilot programs examining the extent to which retail competition may further the interests of utility customers, while others have chosen to learn from the experience of states that pioneer in making changes at the retail level.

In a transitional restructuring process like the current one, prospects for legal uncertainty (enhanced by treble damage exposure) may impede sound decisionmaking by investor-owned utilities. In addition, undue judicial intrusion into state regulatory programs may prevent states from developing optimal regulatory structures. The decision below raises important concerns that could greatly impact EEI's members during this period of transition.

SUMMARY OF ARGUMENT

The lower court's decision reflects a troubling lack of respect for state legislative, regulatory and judicial processes. The circuit court reformulated the two-pronged test

for state action immunity by engrafting a previously unknown requirement that a subordinate state instrumentality must "forthrightly state" a policy to displace competition in local markets, even where the legislature has clearly articulated a state policy to substitute agency regulation for competition. In this case, the Oregon Legislature should have been viewed as the source of state policy. In addition, the circuit court's approach blurred the distinction between the two prongs of the *Midcal* test by requiring a fact-intensive analysis to decide the question of clear articulation. If a factual and procedural inquiry is necessary, it should be performed only as a part of the active supervision prong of the test.

The court of appeals wrongly accepted the Department of Justice's view that foreseeability of anticompetitive restraints requires a showing of express authorization of particular anticompetitive behavior. No such requirement has been recognized by this Court, and indeed, such a requirement has been squarely rejected. The new test announced below would embroil federal courts in the interpretation of state statutory and regulatory pronouncements in a manner foreign to the federalism underpinnings of the state action doctrine.

ARGUMENT

I. THE DECISION BELOW IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S STATE ACTION CASES.

The basic premise of state action immunity announced by this Court first in *Parker v. Brown*, 317 U.S. 341 (1943) is "that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985). Around this premise, the Court has fashioned a two-pronged test for analyzing competitive restraints that seeks to balance the interests of federalism and competition:

"first, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The parts of the two-pronged *Midcal* test serve distinct, though related, purposes. The "clear articulation" prong of the test requires a showing that a state has established a policy to displace competition with regulation. This part of the test does not require that the relevant statute expressly permit the displacement of competition. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 372 (1991). Rather, the suppression of competition need only be a "foreseeable result" of the legislative authorization. *Id.* at 373. The "active supervision" prong of the test serves to ensure that a private actor is engaging in conduct according to state policy, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), and that "the State has played a substantial role in determining the specifics of the economic policy," *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635 (1992).

A. The Ninth Circuit's Reformulation of the "Clear Articulation" Requirement Distorts the Analytic Framework Established by This Court.

As this Court declared in *Southern Motor Carriers*, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." 471 U.S. at 64. In this case, the Oregon Legislature declared its intention to displace competition with a regulatory structure when it vested authority in the Oregon Public Utility Commission ("OPUC")[2] to approve the creation of exclusive service territories in order to elimi-

[2] Capitalized terms not otherwise defined herein have the meaning assigned by the Court below. *See Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1997).

nate and prevent duplication of utility facilities. *See* Or. Rev. Stat. §§ 758.405 & 758.410. The decision below recognized these statutory mechanisms, *see* 111 F.3d at 1433 n.2, but then found them insufficient to satisfy the first *Midcal* prong. *See id.* at 1437.

The Ninth Circuit affirmed the district court's conclusion that "the state did not approve the displacement of competition with territorial monopolies in the Portland market with the clarity required by *Midcal*," *id.* at 1437, because "the 1972 Order fail[ed] to speak with sufficient clarity to satisfy the *Midcal* test." *Id.* The court thus determined that "the OPUC did not 'forthrightly state' a policy of the state of Oregon that was 'clear in its purpose' to displace competition *in the Portland* market with territorial monopolies." *Id.* at 1438 (emphasis added). This portion of the court's reasoning was flawed in two subtle but significant ways: first, the court improperly shifted the source of clearly articulated state policy from the Oregon Legislature to the OPUC; second, the court transformed the straightforward question of whether the legislature "displaced competition with a regulatory structure" [3] into a fact-intensive analysis of whether the subordinate state agency displaced competition in a particular local marketplace. By virtue of these errors, the lower court radically changed the first *Midcal* prong from one focused on the legislature's declaration of policy to one focused on the regulatory agency's specific application of that policy in the Portland market. The separate elements of the *Midcal* test were not intended to be mixed and intertwined in this manner.

This Court consistently has made clear that the source of clearly articulated policy is the state acting as sovereign—typically, the state legislature or possibly a state supreme court. *See, e.g., Southern Motor Carriers*, 471 U.S. at 63 ("*Parker* immunity is available only when the

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[3] *See Southern Motor Carriers*, 471 U.S. at 64.

challenged activity is undertaken pursuant to a clearly articulated policy of the state itself, such as a policy approved by a state legislature, or a State Supreme Court") (internal citations omitted); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.2 at p. 158 (Supp. 1997) ("when we speak of authority, moreover, we are usually referring to powers flowing from state constitutions or legislation."); *cf. Town of Hallie*, 471 U.S. at 42-44 (focusing on whether the *legislature* contemplated the kind of action complained of, and analyzing text of state statutes); *Southern Motor Carriers*, 471 U.S. at 60 (discussing *source* of state policy). Here, by contrast, the Ninth Circuit all but acknowledged that the legislature had expressed legislative policy with clarity,[4] but determined that "the OPUC cannot confer state action immunity by forming an intent that is not expressed forthrightly and clearly," 111 F.3d at 1440 Inasmuch as the court disregarded the Oregon Legislature as the source of state policy under *Midcal*, the court's search for clear articulation by OPUC was misguided.

Moreover, the Ninth Circuit's version of the clear articulation prong of *Midcal*, by blending the purposes of both prongs, misapprehends the separate yet interrelated

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[4] Although the court seemed to recognize the "clarity with which chapter 758 expresses a legislative policy" authorizing regulatory approval of exclusive service territory agreements, *see* 111 F.3d at 1437, it placed an extremely limiting interpretation on that policy: "Since the Oregon statute speaks solely of authorizing the OPUC to approve exclusive service territories, the state's clearly articulated policy is to have the OPUC decide whether to sanction anticompetitive conduct. It follows, therefore, that we must look to the decisions of the OPUC to determine whether PGE's conduct was part of a clearly articulated state policy." *Id.* at n.8. To the extent the court read the Oregon statutes as merely "neutral" regarding the establishment of exclusive service territories, it failed to give those statutes a fair reading. *See Southern Motor Carriers*, 471 U.S. at 64; *Town of Hallie*, 471 U.S. at 43. The Oregon statutes in this case cetrainly were not silent; they plainly contemplated the type of agreement entered into by PGE and then left OPUC to supervise the details.

purposes of *Midcal's* two elements. Both elements "are directed at ensuring that particular anticompetitive mechanisms operate because of deliberate and intended state policy." *Ticor*, 504 U.S. at 636 (1992). But beyond that, the two parts of the test serve separate and distinct objectives and must be separately analyzed:

> In the usual case, *Midcal's* requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; *it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State.* It seems plain, moreover, . . . that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these states deem necessary.

Id. at 636-37 (emphasis added). The Ninth Circuit's approach was flawed because it attempted to force the clear articulation requirement "alone to ensure . . . that particular anticompetitive conduct has been approved by the State." In doing so, it impinged on the regulatory flexibility of the states to an impermissible degree.

The improper blurring of the *Midcal* elements below also can be seen from the decisions relied on to support the Ninth Circuit's analysis. The only issue below was whether Oregon had clearly articulated a policy to displace competition, yet the opinion neither analyzed nor relied upon this Court's recent clear articulation pronouncements. Indeed, the opinion never mentioned *Southern Motor Carriers* or *Omni*, and considered *Town of Hallie* only long enough to distinguish it. *See* 111 F.3d at 1444. In large measure, the lower court found guidance in *Patrick v. Burget*, 486 U.S. 94 (1988) and *Ticor* —cases in which the first *Midcal* prong was not before the Court and the only issue was one of active supervision. *See, e.g.*, 111 F.3d at 1436, 1442 (citing *Patrick*); 111 F.3d at 1436, 1437 n.8 (citing *Ticor*). With such heavy reliance on active supervision cases, it is not surprising that the court's perspective on clear

articulation tended to focus excessively on the regulatory oversight provided by OPUC rather than the policy declaration of the Oregon Legislature.[5]

It is worth noting that if the Ninth Circuit's clear articulation test had been applied in *Town of Hallie*, the municipal actor in that case would have failed the test. The Wisconsin statutes certainly made no mention of the application of the general statutory powers to any particular local market (such as area surrounding the City of Eau Claire). There was no arguably ambiguous regulatory authorization in *Town of Hallie* because no state regulatory agency even existed to exercise oversight over municipal sewage systems. Although *Town of Hallie* could be read to recognize a slight difference in the application of the first *Midcal* prong where the defendant is a municipality,[6] the Court has not stated that there are two different standards for clear articulation or elaborated on how the municipal standard might differ from the private party standard. More importantly, the Court's private party cases rely heavily on *Town of Hallie* and its teaching regarding the degree of specificity required in legislative authorization. *See, e.g., Southern Motor Carriers*, 471 U.S. at 48 n.20, 62, 64 (relying on *Town of Hallie's* clear articulation analysis). The clear articulation standard crafted below, if accepted, would undermine the teaching of *Town of Hallie*, would have likely changed the outcome of that case, and should be rejected.

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[5] The lower court's frequent references to dicta in *Ticor* also ignore the context of *Ticor's* active supervision holding—a "negative option" regulatory structure in which the regulator failed to act. *See Ticor* 504 U.S. at 629. Justice Kennedy's opinion in *Ticor* expressly was limited to that context. *See id.* at 638 (mere potential for state supervision "is not an adequate substitute for a decision by the State."); *id.* at 639 (characterizing case as one involving "agency inaction"). In this case, the OPUC did act and the issue instead turned on the meaning and intent of that action.

[6] *See Town of Hallie*, 471 U.S. at 45.

B. The Ninth Circuit Compounded Its Analytical Error by Accepting and Applying "Express Authorization" From the OPUC as a Necessary Predicate for State Action Immunity.

The decision below is replete with detailed discussion and analysis of what OPUC did and said, and how that squared with the statutory framework established by the Oregon Legislature. Such detailed analysis of an administrative order cannot be reconciled with the Court's warning in *Omni* against undue intrusion into state process. While *Omni* recognized that a municipality might be said to have acted outside its authority "whenever the nature of its regulation is substantively or even procedurally defective . . . such an expansive interpretation of the *Parker* defense authorization requirement would have unacceptable consequences." 499 U.S. at 371. The unacceptable consequences would include tearing the fabric of federalism itself. *Id.* at 372.[7] Consequently, this Court required that federal courts "adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372. This rule must apply with equal force to the actions of a subordinate state administrative agency.

The Court in *Omni* compared its examination of a subordinate governmental entity's authority in the state action immunity context to the examination of a state judge's authority in the judicial immunity context. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). In *Stump*, the Court ruled that judicial immunity applies "even if [the judge's] exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 359.

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[7] As noted in *Omni*, commentators have cautioned against allowing a federal antitrust court to become " 'the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.' " *Id.* at 372 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, p. 145 (Supp. 1989)).

Further, the Court concluded that "the nature of the act itself" determines whether it is a "judicial" act that imbues the judge with judicial immunity. *Id.* at 362. Specifically, the *Stump* court focused on whether the judge's act was "a function normally performed by a judge" and whether the parties "dealt with the judge in his judicial capacity." *Id.* There is no doubt that the 1972 Order was a function normally performed by the OPUC and that the parties dealt with the OPUC in its official capacity. No further intrusion into the OPUC's authority was appropriate.

In its consideration of how clearly a state policy must be articulated by the legislature under *Midcal's* first prong, the *Town of Hallie* Court explained that the relevant inquiry should focus on foreseeability. *See Town of Hallie*, 471 U.S. at 42 (conduct need only be "contemplated," not expressly mentioned in the statute). In attempting to apply this foreseeability test, however, the Ninth Circuit completely missed the point and read *Town of Hallie* as requiring "express authorization" of the anticompetitive conduct. *See* 111 F.3d at 1444 ("the [*Town of Hallie*] Court held that this result was foreseeable because the state expressly authorized the city's anticompetitive behavior"); *id.* ("As the Antitrust Division puts it, 'express authorization [is] the necessary predicate for the Supreme Court's foreseeability test.' ").[8] *Town of Hallie* does not impose this requirement and flatly rejects "express authorization" as a predicate for foreseeability.

The *Town of Hallie* opinion did not confer immunity because the Wisconsin Legislature had expressly authorized the municipality's anticompetitive behavior. To the contrary, the Court stated that "[i]t is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie,*

[8] Neither the Antitrust Division nor the court below cited specific authority for the "express authorization" requirement.

471 U.S. at 42. The extent of authority expressly granted by the Wisconsin Legislature was no more than the general authority to provide sewage services and "to determine the areas to be served." *Id.* at 42. The Court found that authorization sufficient because anticompetitive effects "logically would result from this broad grant of authority." *Id.* In effect, the Court inferred the requisite site authorization and did not require that it be expressly stated.

The Wisconsin statutes in *Town of Hallie* certainly did not expressly authorize the anticompetitive conduct complained of—that is, tying sewage treatment to sewage collection and transportation—or in any respect speak to the particular geographic area surrounding the City of Eau Claire. Nonetheless, the Court found that they satisfied the clear articulation requirement. The Oregon statutes here are much more explicit than those found sufficient in *Town of Hallie* because they contemplate OPUC approval of contracts "between competitors that divide markets into exclusive service territories." *See* 111 F.3d at 1433 n. 2. In short, this Court has found clear articulation under circumstances much less compelling than the instant case. *See, e.g., Southern Motor Carriers,* 471 U.S. at 63-64 (adequate authorization found in broad grant of statutory authority to prescribe "just and reasonable" rates, which made clear the legislature's intent that rates be set by regulators rather than the market).[9]

The decision in *Southern Motor Carriers* also counsels against requiring "express authorization" in the manner that the lower court did. As the Court noted there, "[a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *Southern Motor Carirers,* 471 U.S. at 64. According to the Court,

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[9] *See also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 at p. 163-64 (Supp. 1997) ("Inevitably, the antitrust courts have not insisted upon express statutory authorization of the challenged activity with an intent to displace the antitrust laws.").

> [i]f more detail than a clear intent to displace competition were required of the legislature, states would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Id. at 64. These statements are especially instructive here because *Southern Motor Carriers* was a private party case addressing the clear articulation requirement rather than the active supervision requirement. The Ninth Circuit's probing and nondeferential review of the Oregon regulatory process ignored this admonition. Such detailed antitrust court review of the actions of state agencies would seriously compromise the usefulness of delegation to subordinate state agencies.

The court's error led it to seek clear articulation from the wrong source, then to proceed to dissect the deliberative process of OPUC in a misguided search for express authorization. In the end, the court found itself considering the foreseeability of the Portland service area agreement in relation to the 1972 Order when it should have been considering the foreseeability of that agreement in relation to the admittedly clear Oregon statutory framework.

C. The Test Applied Below, if Followed, Would Embroil Federal Antitrust Courts in Unnecessary Interpretation of State Regulatory Actions and Procedures.

In *Town of Hallie*, this Court commented on the threat to federalism that would flow from a clear articulation test predicated upon "explicit authorization" by the State:

> Requiring such a close examination of a state legislature's intent to determine whether the federal anti-

> trust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny.

471 U.S. at 44 n.7. The Court was rightly concerned about the prospect for "embroiling" federal courts in matters of state law. State action immunity is "conferred out of respect for ongoing regulation by the State," *Ticor*, 504 U.S. at 633, and this respect for state regulation lies at the core of *Parker*. Excessive federal court involvement in interpretive issues under state law would fail to accord the appropriate respect. Such a standard would undermine federalism by sending mixed signals to regulated parties and exposing them to antitrust damages for conduct sanctioned under state law.

To the extent these concerns are implicated by difficult state law questions of statutory interpretation, they are similarly (or perhaps more forcefully) raised where state regulatory and judicial processes are involved. One leading treatise recently described the implications of excessive federal involvement in state administrative programs:

> . . . the question remains whether antitrust courts ought to review state agencies for "ordinary" errors in essentially the same way they review federal administrative errors. Wise and efficient federalism calls for no such result. The *Lafayette* authorization requirement should not be manipulated in such a way as to thwart the fundamental *Parker* policy against antitrust scrutiny of state action. The antitrust court should require no more than that the result of the agency's act or decision was of the sort contemplated by state anticompetitive policy. "Ordinary" errors or abuses in the administration of jurisdiction conferred by the state should be left for state tribunals to review.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b at p. 181 (Supp. 1997). Wise and efficient federalism should continue to guide federal courts regarding the first prong of *Midcal*, and this Court should vigorously resist efforts to manipulate the legal standard by intruding on the operation of state agencies.

The Ninth Circuit took a very different approach—one that embroiled it in determining whether OPUC (as distinguished from the Oregon Legislature) had spoken with "sufficient clarity." The court compared language in the 1972 Order with the text of other portions of that order relating to a different locality, compared the 1972 Order with an ordinance of the Portland City Council, and attached great significance to OPUC's failure to mention chapter 758 of the Oregon Code in the text of the 1972 Order. *See* 111 F.3d at 1437-38. The court was "struck by the precision and care with which OPUC cited various statutory provisions" and used elaborate interpretive arguments and negative inferences to find the 1972 Order ambiguous. *See id.* In finding this ambiguity, the lower court had to sidestep OPUC's own account of the "statutory import" of its 1972 Order, subsequent OPUC orders that supported PGE's interpretation,[10] and even pronouncements of the Oregon judiciary regarding the meaning of the 1972 Order. *See id.* at 1438, 1441-42. To merely describe this complex inquiry is to refute it. Even if the lower court correctly navigated through the competing inferences and interpretive principles (and EEI believes that it did not), the court's methodology was not grounded, as it must be, in respect for state regulation.

EEI also submits that the Ninth Circuit's treatment of the 1972 Order entails an unrealistic view of state administrative processes. In *Town of Hallie*, this Court refused to require an explicit legislative declaration of contem-

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[10] OPUC's 1992 Order not only recognized that the Commission had intended to allocate exclusive service areas, but also "confirmed" that it had done so in the 1972 Order. *See* App. M1, M23.

plated anticompetitive effects because such a rule would "[embody] an unrealistic view of how legislatures work and of how statutes are written." *See* 471 U.S. at 43. The Court likewise should correct the lower court's unrealistic view of regulatory orders. To be sure, some are crafted with great care and precision. It is equally sure, however, that some state administrative orders are drafted without detailed internal and external comparisons of the type made below and with less than perfect statutory citations. A single, perceived glitch in the text of an order should not make the difference between complete immunity and treble damages. This is especially true where, as here, the state administrative and judicial system has concluded that there was no glitch.

The lower court's treatment of the judicial review process relating to the 1992 Order likewise was too quick to dismiss the conclusions of the Oregon judiciary. Federal antitrust courts should be extremely reluctant to disregard regulatory and judicial interpretations of state law. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) (quoting *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974) ("We may not 'construe a state statute contrary to the construction given it by the highest court of a State.' ")

The Ninth Circuit determined that the issue addressed in OPUC's 1992 Order was "not identical to the state-action immunity issue," 111 F.3d at 1441, and therefore, that the 1992 Order and the Oregon courts' affirmance of that order were of little relevance. Even if the issue in the Oregon proceedings technically differed from the federal immunity issue, the holdings of the state agency and courts should have been instructive. *See Town of Hallie*, 471 U.S. at 44-45 n.8 (state interpretation of the statutes is "instructive on the question of the state legislature's intent in enacting the statutes"). If anything, federal antitrust analysis should be more (not less) deferential to the agency than state judicial analysis. In this case, the court's im-

munity standard differed in the wrong direction: it was "too grudging in its inference of authority." [11]

II. THE DECISION BELOW IS AT ODDS WITH THAT COURT'S OWN DECISIONS AND THOSE OF VARIOUS CIRCUIT COURTS OF APPEALS.

The Ninth Circuit's deconstruction of the 1972 Order conflicts with the holdings of a number of other circuit courts, including the Ninth Circuit's own decision in *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985). Relying on federalism principles, the *Llewellyn* court recognized that where a state official is given authority by the legislature to suppress competition through the setting of rates, state action immunity is not lost because the official's actions are "taken in a procedurally improper manner." 765 F.2d at 773-74 ("[A]ctions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law.").

The distinction of *Llewellyn* offered below underscores the court's distortion of the clear articulation requirement. While the Ninth Circuit correctly viewed the clear articulation requirement as applicable to the state legislature in *Llewellyn*, the court below transposed that requirement and applied it to actions of a subordinate state agency. *Compare Llewellyn*, 765 F.2d at 774 (official's "actions were taken pursuant to an express state policy and were of a kind contemplated by the statutory scheme"), *with Columbia Steel*, 111 F.3d at 1439 ("the OPUC did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland"). The statement by the court below admits the "statutory authority" of the OPUC. Had the court focused on whether the OPUC's 1972 Order was consistent with state policy and the type of action contemplated by

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[11] P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 at pp. 174, 176-77 n.68 (Supp. 1997).

Oregon's statutes, as the *Llewellyn* court did, it would have found clear articulation.

Regulated utilities should not be required to obtain judicial review of every public commission order to ascertain whether the substantive and procedural aspects of the commission's actions conformed with state law. The rationale below would require as much, and even then, utilities would not be assured of antitrust immunity because of the possibility that federal courts would interpret state law differently. Such a result conflicts with the Tenth Circuit's decision in *Lease Lights, Inc. v. Public Service Co. of Oklahoma*, 849 F.2d 1330, 1334 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989) (state action immunity should protect those "reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized"). PGE must be entitled to rely on the 1972 Order if the *Parker* doctrine's respect for state governmental process has continued vitality.

OPUC's subsequent recognition that the two utilities did not compete in Portland should have enhanced PGE's right to rely on the 1972 Order. Instead, the Ninth Circuit gave those subsequent orders no effect whatsoever. Such an approach is at odds with the Eleventh Circuit's decision in *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1678 (1996). The issue in *Praxair* was whether a utility service area agreement had been sufficiently scrutinized by state regulators. It should be noted that this analysis was performed under the active supervision prong of *Midcal* (as it should have been here), not the clear articulation prong. As in the present case, decades passed during which the public utilities assumed that a territorial division was in effect. The state agency later issued an interpretive order clarifying its earlier territorial allocation order. The Eleventh Circuit found both the parties' conduct and the Florida Commission's actions subsequent to its original order determinative of the existence of active supervision. *Id.* at 613-14.

III. THE LOWER COURT'S ERRONEOUS "CLEAR ARTICULATION" TEST FOR IMMUNITY COULD HAVE FAR-REACHING EFFECTS THAT UNFAIRLY PENALIZE PRIVATE PARTIES AND IMPEDE STATE REGULATORY INITIATIVES.

Regulated electric utilities currently operate in markets that are amidst great change. All fifty states and the District of Columbia have initiated legislative or regulatory proceedings to examine retail competition, deregulation or restructuring of the electric utility industry. Traditionally, regulation of the electric utility industry has been shared by the Federal Energy Regulatory Commission ("FERC") and the states. FERC has jurisdiction over interstate transmission of electricity and sales of electricity at wholesale. 16 U.S.C. § 824(a) (1988). States maintain jurisdiction over retail sales as well as distribution. *Id.*; *see also* Elisabeth Pendley, *Deregulation of the Energy Industry*, 31 LAND & WATER L. REV. 27, 64 (1996). Increased competition may require FERC and the states to redefine their regulatory responsibilities. *Id.* at 74. Indeed, the evolution of the electric utility industry and the corresponding changes to its regulatory structure call for increased confidence that compliance with state regulation will not give rise to antitrust liability.

Considering that electric utilities will remain subject to significant regulation even in a deregulating environment[12] and that the potential exists for possible conflicts over jurisdictional issues, electric utilities have a particularly strong need at this time for clear guidance regarding the scope of state action protection. If allowed to stand, the decision below threatens to compound the legal uncertainty surrounding the restructuring process and heighten the possibility of inconsistent federal and state rules.

The need for clarity and guidance regarding the interplay between the state action doctrine and territorial regulation is underscored by the numerous appellate cases

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[12] *See* Melamed Statement *supra*.

that have involved that interplay. *See Praxair*; *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991), *opinion after remand*, 21 F.3d 384 (11th Cir. 1994), and *cert. denied*, 513 U.S. 1148 (1995); *Consolidated Gas Co. of Fla. v. City Gas Co. of Fla.*, 912 F.2d 1262 (11th Cir. 1990) *cert. granted and judgment vacated* 499 U.S. 915 (1991); *Fuchs v. Rural Elec. Convenience Co-op. Inc.*, 858 F.2d 1210 (7th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). State territorial allocation of electricity distribution facilities is likely to continue, albeit in a revised form when states introduce retail competition in the sale of electricity,[13] and that fact will further increase the need for clear guidance concerning the application of the state action doctrine.

CONCLUSION

The approach to clear articulation applied below evidences a troubling lack of respect for state legislative, regulatory and judicial process. For the reasons stated, the Petition for Writ of Certiorari should be granted.

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August 7, 1997

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[13] Numerous states have territorial allocation status for electric service. *See* Samuel H. Porter & John R. Burton, *Legal and Regulatory Constraints on Competition in Electric Power Supply*, PUBLIC UTILITIES FORTNIGHTLY v. 123, no. 11 (May 25, 1989) (at least 23 states then had service area allocation statutes). Indeed, EEI's own investigation suggests that approximately 36 states currently permit or require some form of exclusive territorial division of utility service.